



February 9, 2001

Mr. Herbert L. Prouty
City Attorney
City of Denton
215 East McKinney
Denton, Texas 76201

OR2001-0514

Dear Mr. Prouty:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 144057.

The City of Denton (the "city") received a request for five items of information. You claim that certain information that is responsive to request item two, correspondence or communications between the city and Diversified Utility Consultants, Inc., and request item five, communications between the city and any other person or municipality regarding the joinder of any municipality as a party in any litigation against TXU Electric Company and/or TXU Gas Company, is excepted from disclosure under sections 552.103, 552.104, 552.106, 552.107(1), 552.110, 552.111 and 552.131 of the Government Code. In accordance with section 552.305 of the Act, the city notified three third parties whose proprietary interest may be implicated by the public release of portions of the information at issue. The three notified parties are C2 Consulting Services ("C2"), Coserv Gas Company ("Coserv"), and the Texas Municipal Power Agency ("TMPA"). Neither C2 nor Coserv submitted to this office a response to the city's notification. TMPA responded to the notification by asserting that certain TMPA cost information is excepted from disclosure under sections 552.104, 552.110 and 552.131 of the Government Code. The requestor also submitted comments to this office. *See* Gov't Code § 552.304. We have considered the exceptions you claim and those of TMPA as well as the requestor's comments. We have reviewed the information the city

submitted, which you say is a representative sample of the information at issue.¹ We have also reviewed the cost information TMPA submitted.

We begin by addressing the C2 and Coserv information. As neither of these companies responded to the city's notification, we have no basis on which to determine that their information is excepted from required public disclosure. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, these two companies' information may not be withheld from the requestor in order to protect the companies' proprietary interest.

We turn now to the raised exceptions. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post*

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Co., 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

The city asserts that portions of the requested information relate to the case of *City of Denton, Texas v. Texas Utilities Co.*, No.00-9383 (134th Dist. Ct. Dallas County, Tex., filed Nov 21, 2000). We have reviewed plaintiff's original petition in that case. We conclude that the city has shown that the information relates to pending litigation.

It has been suggested that the protection of section 552.103 should not extend to information the city has exchanged with other cities involved in the litigation. We disagree. A governmental body may release information to another governmental body without destroying the protection of the information because such a release is not a release to the public. See Open Records Decision Nos. 661 at 3 (1999), 183 at 5 (1978). Moreover, with section 552.103 claims, this office has stated that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). Here, the other cities' communicating with the city are not opposing parties in the litigation; therefore, the city's litigation interest in the information remains. Consequently, we conclude that the city may withhold the information from the requestor based on section 552.103, with the following exceptions.

One document is subject to required disclosure under section 552.022(a)(1) of the Government Code. Section 552.022 provides that certain categories of information are not excepted from required disclosure "unless they are expressly confidential under other law." Section 552.103 as well as sections 552.107 and 552.111, the other exceptions you raised for this document, are not "other law" for purposes of section 552.022. One of the section 552.022 categories consists of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body." We have marked the document the fits into this category.

In addition, we reiterate that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). Finally, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.106 excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation" and "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation." Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between

the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. *Id.* at 2. This office has concluded that the drafts of municipal ordinances and resolutions which reflect policy judgments, recommendations, and proposals are excepted by section 552.106. Open Records Decision No. 248 (1980). We agree that the submitted draft ordinance is excepted from disclosure based on this exception.

You contend that some of the documents are excepted from disclosure under section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* We agree that portions of the city's submissions are protected from disclosure under this provision and have marked the documents accordingly.

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. ORD 615 at 4-5. This exception applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). We agree that portions of the information are excepted from disclosure based on section 552.111 and have marked the documents accordingly.

Section 552.131 of the Government Code excepts from disclosure a public power utility's information related to a competitive matter. Section 552.131(b) provides:

Information or records are excepted from the requirements of section 552.021 if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters.

Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Gov't Code § 552.131(b). A "competitive matter" is defined as a matter the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity, and the release of which would give an advantage to competitors or prospective competitors. Gov't Code § 552.131(a)(3). Section 552.131(a)(3) lists thirteen categories of information that may not be deemed competitive matters. The attorney general may conclude that section 552.131 is inapplicable to the requested information only if, based on the information provided, the attorney general determines the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. Gov't Code § 552.131(c).

The city council passed a resolution by vote pursuant to section 552.131 in which it defined certain categories of information as "competitive matters." We find that portions of the submitted information are related to one or more of those categories. The requested information is not clearly among the thirteen categories of information expressly exempted from the definition of competitive matter, and we have no evidence that the city council failed to act in good faith. Consequently, we agree that portions of the information requested are related to competitive matters in accordance with the city's resolution and, therefore, are excepted from disclosure pursuant to section 552.131.

TMPA's Board of Directors has likewise passed a resolution pursuant to section 552.131 to protect its records related to competitive matters. We have reviewed that resolution and TMPA's information. The requested information is not clearly among the thirteen categories of information expressly exempted from the definition of competitive matter, and we have no evidence that TMPA's Board of Directors failed to act in good faith. Consequently, we agree that the TMPA information is related to competitive matters in accordance with TMPA's resolution and, therefore, is excepted from disclosure pursuant to section 552.131.

In light of our conclusions above, we need not consider the applicability of the other exceptions you raise. In summary, the city may withhold the bulk of the information from disclosure based on sections 552.103 and 552.131. In addition, the city may withhold from disclosure marked portions of the information based on sections 552.106, 552 107(1) and 552.111. The city must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

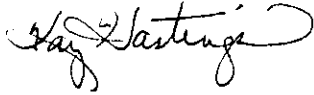
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/seg

Ref: ID# 144057

Encl. Marked documents

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